

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

74-1806

United States Court of Appeals
FOR THE SECOND CIRCUIT

EXXON CORPORATION,

Plaintiff-Appellant

v.

THE CITY OF NEW YORK, ENVIRONMENTAL PROTECTION
ADMINISTRATION OF THE CITY OF NEW YORK and
ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION
ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees

GETTY OIL CO. (Eastern Operations) INC.,
GULF OIL CO. U.S., MOBIL OIL CORPORATION and
SUN OIL COMPANY OF PENNSYLVANIA,

Plaintiffs-Appellees

v.

THE CITY OF NEW YORK, HERBERT FLISH,
Environmental Protection Administrator of the City of New York,
and THE ENVIRONMENTAL PROTECTION
ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL REPLY BRIEF FOR APPELLANTS

SHAW, GUNDEL, WALKER & CASANOVA

Attorneys for Plaintiff-Appellants

GETTY OIL CO. (Eastern Operations) INC.,
GULF OIL CO. U.S., MOBIL OIL CORPORATION
and SUN OIL COMPANY OF PENNSYLVANIA
330 Madison Avenue, New York, N.Y. 10017

MILES F. McDONALD
RICHARD F. CZAJA
Of Counsel

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P/S

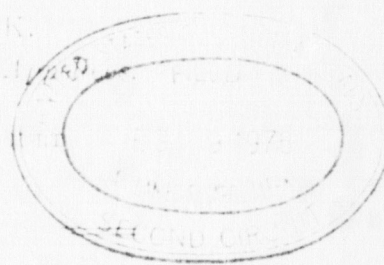


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PRELIMINARY STATEMENT

This Supplemental Reply Brief is submitted by appellants Getty Oil Co. (Eastern Operations), Inc., Gulf Oil Co., -- U.S., Mobil Oil Corporation, and Sun Oil Company of Pennsylvania (the "Getty plaintiffs") in reply to the brief ("def. br.") filed by defendant-appellees the City of New York, et al. (the "City"). This brief supplements a reply brief filed by the Getty plaintiffs jointly with appellant Exxon Corporation and deals solely with the volatility regulations challenged by the Getty plaintiffs but not challenged by Exxon Corporation.

REPLY TO DEFENDANTS' ARGUMENT

LOCAL REGULATION OF GASOLINE VOLATILITY HAS BEEN PREEMPTED BY THE FEDERAL REGULATIONS

The City's proffered interpretation of the preemption provision of the Clean Air Act attempts to read the language ". . . no State (or political subdivision thereof) may prescribe or attempt to enforce . . . any control or prohibition respecting use of a fuel . . . if the Administrator has prescribed . . . a control or prohibition applicable to such fuel . . ." (emphasis supplied) (42 U.S.C. §1857f-6c(c)) out of the Act. Any regulation "applicable to" a fuel will necessarily function by regulating certain specific characteristics of that fuel. Yet, under the City's view of the

preemption provision any such regulation will be "applicable to" only the particular characteristic or additive specifically mentioned in the regulation.

Thus, the City argues that the present regulations (40 C.F.R. Part 80) are applicable only to lead. Presumably, if the federal government were to promulgate volatility regulations, under the City's view, such regulations would be applicable only to the butane-pentane fraction of gasoline (def. br. p. 16). If a federal regulation mentioning one hundred specific characteristics of gasoline were promulgated, any locality which could define a one hundred and first characteristic could set up its own regulatory scheme under the City's interpretation of the Act. We submit that it was precisely to avoid such conflicting regulatory schemes that Congress precluded local "control . . . respecting use of a fuel" once a federal regulation "applicable to such fuel" had been prescribed.

The EPA Administrator in promulgating the most recent federal regulations discussed the significant effect of regulation of lead content on gasoline production and found that a revised phase-down schedule was required to avoid significant gasoline shortages:

"In order to remove lead additives from gasoline and retain the octane rating necessary to meet the octane requirements of motor vehicle engines, it is necessary for refiners to produce more high octane components as a lead substitute. The amount of high octane components which can currently be produced is insufficient to supply the demand created by the need for lead-free gasoline, gasoline complying with the phase-down schedule and feedstocks for the petrochemical industry.

"Production of high octane components requires that a refiner install additional refining facilities. The lead time necessary to plan, procure and construct the new equipment is about 2 to 3 years from the completion of planning to on-line operation. It is more efficient for a refiner to install sufficient capacity to meet the lowest required lead level than to build smaller additions each year to meet a gradually phased schedule. In other words, given the need to add new processing facilities at a particular refinery, the addition needed to enable a reduction of lead content from 2.0 gpg to 1.0 gpg would require approximately the same lead time as that enabling a full reduction to 0.5 gpg."

* * *

"The EPA consultant and the FEA concluded that, given the industry's present inability to produce sufficient high octane gasoline, enforcement of the promulgated phase-down schedule could result in a gasoline shortage of approximately 6.6% of demand (about 500 MBPCD) in 1977 and 9.0% (about 700 MBPCD) of demand in 1978 (comparable to the 6.7 to 8.8% experienced during the height of the 1974 embargo)." 41 Fed. Reg. 42675-42676 (attached to appellants' main brief as Addendum F).

The City's lead restrictions conflict directly with the federal phase-down (appellants' main brief, pp. 17-18). Yet, the City would have this Court hold that if every locality in the country adopted such precipitous lead regulations thereby causing a nationwide shortage of gasoline, no preemption of such local regulations would have occurred on the ground that the localities were merely filling in an interstice in the federal regulation of the lead content of gasoline.

The City further argues that the volatility regulations should be upheld because "lead . . . is unrelated to the volatility characteristics of gasoline." (def. br. p. 16). Yet, no requirement of relationship or non-relationship appears in the preemption provision of the Clean Air Act. Simply stated Congress has determined that federal and local regulations are "related" and cannot coexist if the federal regulation is applicable to gasoline while the local regulation respects the use of gasoline.

In summary, in promulgating 40 C.F.R. Part 80, the EPA "is essentially telling manufacturers how to make their fuels . . ." (Ethyl Corp. v. Environmental Protection Agency, 541 F. 2d 1, 11, n.14- (D.C. Cir. 1976). The City



in enacting both the lead and the volatility regulations is likewise telling manufacturers how to make their fuels, and, for this reason, the City's regulations have been preempted.

CONCLUSION

For the reasons stated herein and in appellants' main, supplemental and reply briefs, the decision of the Court below, denying plaintiffs' motion for summary judgment, should, therefore, be reversed and this case should be remanded to the District Court for an order granting plaintiffs' motion for summary judgment on the first cause of action and severing the second cause of action.

Respectfully submitted,

SHEA GOULD CLIMENKO & CASEY
Attorneys for Plaintiffs-Appellants
Getty Oil Co. (Eastern Operations),
Inc., Gulf Oil Co.-U.S., Mobil
Oil Corporation, and Sun Oil Com-
pany of Pennsylvania
330 Madison Avenue
New York, New York 10017
212-661-3200

Of Counsel:

Miles F. McDonald
Richard F. Czaja